

3

No. 98-436

FIL

OCT 19 1998

IN THE
Supreme Court of the United States

OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCTOBER TERM, 1998

JOHN H. ALDEN, *et al.*,
v. *Petitioners,*
STATE OF MAINE,
Respondent.

On Petition for a Writ of Certiorari to the
Maine Supreme Judicial Court

REPLY BRIEF FOR PETITIONERS

JONATHAN P. HIATT
LARRY ENGELSTEIN
816 16th Street, N.W.
Washington, D.C. 20006

DONALD F. FONTAINE
482 Congress Street
Portland, Maine 04112

TIMOTHY L. BELCHER
65 State Street
Augusta, Maine 04332

Of Counsel:

DAVID L. SHAPIRO
1575 Massachusetts Ave.
Cambridge, MA 03138

LAURENCE GOLD *
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

* *Counsel of Record*



6 pp

REPLY BRIEF FOR PETITIONERS

I.

1. The respondent, State of Maine, accepts all of the following: that the instant case and *Arkansas Department of Education v. Jacoby, et al.* (No. 98-04) (pending on petition for a writ of *certiorari*) arise out of the same factual and legal context: that the Maine Supreme Judicial Court's decision here and the Arkansas Supreme Court's *Jacoby* decision are in direct conflict on the Article I legislative powers/state sovereign immunity question presented in the *certiorari* petition here (as Question 1) and in the State of Arkansas' petition in *Jacoby*; and that this sensitive and important federalism question—which has taken on added importance as a result of this Court's *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) decision—is a recurring one that has long been the subject of conflicting views.

All that being so, as the brief in opposition recognizes, the State of Maine, as respondent, has only one card to play: that this petition (and by logical extension the State of Arkansas' petition in *Jacoby*) should be denied so that the question presented may be “illuminated” by further state court proceedings—*viz.* remain uncertain and unresolved for the indefinite future. Br. in Opp. 11-15.

It is telling that the State of Arkansas does not share the State of Maine's position in this regard. And, on analysis, it is difficult to conceive of a case in which the “illumination” argument against review in this Court is less apposite. The facts are not in dispute. The recurring legal issue presented has been well-defined by conflicting decisions and disagreements in debate over time.¹ And,

¹ Indeed, unable to leave any rhetorical stone unturned, respondent both argues that this legal controversy is not ripe for review and taxes us with failing to fully develop the pre-*Seminole* state court decisional law in our petition and with failing to list every post-*Seminole* lower state court decision. Br. n Opp. 8-9, 13 n.6. The brief in opposition then adds to our showing in those two re-

that issue is squarely and directly presented by the conflicting decisions of the Maine Court and the Arkansas Court. There is simply nothing to be gained in the interest of informed and reasoned decisionmaking in this Court that justifies a period of additional litigation in the state courts without any authoritative guidance.

2. As we noted in our petition, these jurisdictional papers do not present the proper occasion for a full-dress consideration of the questions presented here on the merits—that occasion is the briefs on the merits and the oral argument. Given respondent's presentation, however, we do think it appropriate to meet the brief in opposition on three of its points.

a. The brief in opposition (at pp. 6-10) attempts to create the impression that the Eleventh Amendment, and this Court's Eleventh Amendment cases upholding state sovereign immunity in the federal courts, govern here. But this Court has affirmed, and reaffirmed, that the Eleventh Amendment does *not* apply to state court proceedings and thus does *not* provide the State an immunity from suit in the state courts. See Pet. 6, 8-11 (collecting cases).

b. The brief in opposition (at p. 7 n.3) marshalls a set of quotations from the Court's Eleventh Amendment cases in order to suggest that the Court has recognized a general state immunity in private-party state-court federal-law cases absent the State's consent. Those quotations—each of which is taken out of context—do not support that broad proposition. Indeed, the square contrary holding of *Nevada v. Hall*, 440 U.S. 410 (1979), belies respondent's submission in this regard.

c. The brief in opposition's reliance (at pp. 15-17) on *Printz v. United States*, 117 S. Ct. 2365 (1997) and its predecessor "commandeering" Tenth Amendment cases is wholly misplaced. In *Printz*, and in its predecessors, this

gards, *id.*, thereby giving added weight to our submission that this matter is ripe for review.

Court was at pains to distinguish between the situations there at hand and the special role and responsibility of the state courts under the Supremacy Clause in the enforcement of federal law. See, e.g., 117 S. Ct. at 2370-2371, 2381.

II.

Respondent's argument (Br. in Opp. 19-22) that the *certiorari* petition's second question presented—whether Maine can close its courts to employee *federal* statutory wage claims against the State where analogous *state* statutory claims are justiciable—was not considered by the Maine Supreme Judicial Court flies in the face of the record and the Maine Court's decision.

The discrimination argument was fully presented; indeed one of the "issues presented for review" to the Maine Court was whether "the Supremacy Clause of the United States Constitution [is] violated when a state court bars a federal FLSA action against the state for overtime pay while simultaneously permitting similar suits based on state law." Appellants Br. at 3. And, a full seven pages of our principal brief to the Maine Court was in support of the contention that "the state may not discriminate against federal causes of action." Appellants Br. at 14-21. Eight pages of our reply brief, in turn, were in support of the argument that "the Supremacy Clause prohibits discrimination by a state court against federal causes of action that are analogous to justiciable state cases." Appellants Reply Br. at 4-13.

The Maine Court, moreover, never even suggested that the discrimination argument was not properly presented. To the contrary, the court below confronted the argument directly (though choosing to misphrase our discrimination contention as one of "waiver") and in so doing, rejected our position on the merits (and not on any of the procedural grounds tendered by the State of Maine). The Maine Court's ruling, set out in the last section of its opinion (dealing with our "alternative" argument), was that Maine state law does not create a cause of action against the State on the *particular* matter in controversy

(overtime pay) and thus that there was no "waiver" (*viz.*, no discrimination). See Pet. App. 6a-7a.

Contrary to respondent (Br. in Opp. 22), this question—what constitutes discrimination against a federal claim—is decidedly *not* a question of state law. Indeed, the state law here is not in dispute. The question, as in *Howlett v. Rose*, 496 U.S. 356 (1990), is whether, as a matter of federal law, the State is treating federal law claimants in a manner less favorable than the State treats comparable state law claimants. In other words, the issue of whether the lack of a Maine state law "overtime remedy" demonstrates no discrimination against federal law overtime claims—given the availability of other actionable state law claims against the State for wages owing—is in itself a *federal* issue.

The brief in opposition's attempt (at p. 23 n.11) to push *Howlett v. Rose* to one side is misleading. *Howlett* is devoted in substantial part to a detailed elaboration of the State's discrimination against federal (as opposed to state) claims in its courts. 496 U.S. at 378-380. And, *Howlett* made plain that where state courts "entertain[] state common law and statutory claims against state entities in a variety of their capacities" the state courts *cannot* reject a federal claim against the State "for substantive policy reasons" grounded in state law. *Id.* at 379-380. Under the Supremacy Clause, "the federal law is law in the state as much as laws passed by the state legislature." *Id.* at 380. *Howlett* is thus very much in point here.

The brief in opposition would also count it against us that on our second question presented, we do not claim a conflict among the lower courts. But we do claim a conflict that is at least as significant: a conflict between the Maine Court's decision and the line of decisions of this Court from *Mondou v. New York*, 223 U.S. 1 (1912), through *Testa v. Katt*, 330 U.S. 386 (1947), and on to *Howlett*.

CONCLUSION

For the reasons stated in the *certiorari* petition and in this reply brief the petition should be granted.

Respectfully submitted,

JONATHAN P. HIATT
LARRY ENGELSTEIN
816 16th Street, N.W.
Washington, D.C. 20006

DONALD F. FONTAINE
482 Congress Street
Portland, Maine 04112

TIMOTHY L. BELCHER
65 State Street
Augusta, Maine 04332

LAURENCE GOLD *
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

* *Counsel of Record*

Of Counsel:

DAVID L. SHAPIRO
1575 Massachusetts Ave.
Cambridge, MA 03138